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Supreme Court of the United States

OCTOBER TERM 1936

No. 227

JOSE MATOS,

Petitioner,

vs.

ALONSO BROTHERS, ET. AL,

Respondents,

BRIEF AND ARGUMENT OF RESPONDENTS.

PRELIMINARY STATEMENT.

Respondents Request a Complete Review of the Case.

In our brief previously presented in Opposition to the Petition for Writ of Certiorari we objected to the allowance of the writ on the ground that the reasons relied upon by Petitioner are not within those established by the rules and decisions of this court which justify the exercise of its discretional jurisdiction.

That brief was prepared in haste by undersigned counsel and as the result of some delay ocasioned by the retirement from the case subsequent to the decision of the Circuit Court of Appeals of the Honorable Martin Travieso, former Counsel for present Respondents, by reason of his appointment as one of the justices of the Supreme Court of Puerto Rico.

After adequate time has been had to study the case carefully present counsel waives and withdraws these objections which are technical in character, based on discretional jurisdiction and voluntarily, in the name of his

clients, prays the court to consider the case fully upon its merits and to review the entire case upon the record before it in order that this court may do full and complete justice to Respondents by giving them the full measure of relief to which, upon the record and ~~under~~ the law, they are entitled, and which they demanded and obtained in the insular District Court, whose judgment was reversed by the Supreme Court of Puerto Rico.

The decision and judgment of the Circuit Court of Appeals only grants partial relief and justice, by a partial reversal of the judgment of the Supreme Court.

The authority of this court to so review and to modify the judgment of the Circuit Court of Appeals so as to direct a complete reversal of the judgment of the Supreme Court of Puerto Rico is settled by statute and by the decisions of this court which will be hereinafter adverted to. There is no disputed question of fact; the proper decision and judgment in the case depends exclusively upon a single question of law.

In the Insular courts of Puerto Rico juries do not intervene in the trial of civil cases.

The Real and Only Point of Law in Issue is Not Dependent upon a Consideration and Determination of Peculiar features of the Civil Law but Depends Alone upon the Interpretation of a Plain and Mandatory section of the Revised Civil Code of Puerto Rico of 1902 which employs Terms of General and Universal Law only, unaffected by and unrelated to any special or peculiar feature of the Civil Law.

This is Section 1397 of that Code and is as follows:

> "Animals and cattle suffering from contagious diseases shall not be the object of a contract of sale. Any contract made with regard to the same shall be void. A contract of sale of cattle and animals shall also be void when the use or service for which they are acquired being stated they are found to be useless therefor".

When the contract in question was executed there

were in force the following provisions of the Penal Code enacted by the Legislative Assembly of Puerto Rico at the same session of 1902 at which the Revised Civil Code was adopted and the following provisions of the Act of March 14, 1907, all supplementing the provisions of section 1397 of the Civil Code. Both of these laws were of American origin.

PENAL CODE

Section 351, (Section 5803 Revised Statutes 1911); Any person who shall knowingly sell or offer for sale, or use, or expose, or who shall cause or procure to be sold or offered for sale, or used, or exposed, any horse, mule or other animal having the disease known as glanders, or any other contagious or infectious disease, shall be guilty of a misdemeanor".

Secion 352, (Section 5804, Revised Statutes 1911); "Every animal having glanders or any other contagious disease shall at once be deprived of life by the owner or person having charge thereof, upon discovery or knowledge of its condition; and any such owner or person omitting or refusing to comply with the provisions of this section shall be guilty of a misdemeanor".

Section 356, (Section 5808, Revised Statutes 1911) :—

"Every person who owns or has the custody of any cattle, horses, mules or asses infected with a contagious disease, and fails to immediately report the same to the insular health authorities, or conceals the existence of such disease, or attempts so to do, or wilfully obstructs or resists the said health authorities in the discharge of their duty as provided by law, or sells, gives away or uses the meat or milk or removes the skin or any part of such animal, is punishable by fine not exceeding three hundred dollars or imprisonment in jail not exceeding one year, or both in the discretion of the court".

Act of March 14, 1907.

Section 4, (Section 118 Revised Statutes 1911) :—

"Every person who knowingly sells or disposes of to another person any animal infected with or laboring under any infectious or contagious disease, or the meat, skin, hide, horns, hoofs, or any other part of an animal infected with or laboring under any infectious or contagious disease at the time of its death, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be subject to a fine of not less than one hundred dollars and not more than one thousand dollars or imprisonment in jail for not less than one month, nor more than one year, or to both such fine and imprisonment".

Section 7, (Section 121, Revised Statutes 1911) :—

"If any animal infected with or laboring under any infectious or contagious disease, or suspected of being so affected, is sold or disposed of, or is exposed or offered for sale, or is brought or attempted to be brought, for the purpose of being exposed or offered for sale in any market, fair or other open or public place where other animals are commonly exposed for sale, it shall be legal for any inspector or officer of the fair or market, or any policeman, or any local or insular health officer or inspector, to seize the animal and to report the seizure to the Supervisor of Health or to any Insular veterinary inspector, and the Supervisor of Health shall have authority, if he finds such animal to be laboring under any infectious or contagious disease, to order the destruction and disposal of said animal in accordance with the procedure provided by this act, and also to order the thorough disinfection of the premises and destruction of any pens, troughs, hay, straw or other articles which in his opinion present a danger of spreading the disease to other animals.

Section 8, (Section 122 Revised Statutes 1911):—

"The Supervisor of Health shall cause to be slaughtered all animals found to be suffering from infectious disease, or suspected of being so affected, when in his opinion it is necessary to have such animal slaughtered for the purpose of preventing the spread of the disease with which the animal is affected or suspected of being affected. No animal, however, shall be slaughtered because it is belived to be suffering from glanders or tuberculosis, or is suspected of being so infected, until the mallein test has been applied to determine the presence of glanders and the tuberculin test has been applied to determine the presence of tuberculosis and such disease is shown to be present, unless the symptoms of such diseases are plainly and visibly present".

Respondents maintain that section 1399 of the Civil Code providing a special prescription for actions for rescission of valid contracts was improperly applied by the Supreme Court to the action in question which is an action to declare illegal, —inexistent,— a contract entered into with Petitioner for the purchase of a herd of 122 cows for dairy purposes, of which herd 72 died or were condemned by the Public Health Department within a short time after the sale and prior to the suit.

Section 1399 is as follows:—

"The redhibitory action based on the vices or defects of animals must be instituted within 40 days counting from their delivery to the vendee unless, by reason of the customs in each locality longer or shorter periods are established. This action in the sale of animals may only be enforced with regard to the vices and defects of the same determined by law or by local customs".

It can not, and will not be denied that this prescription is applicable and limited to redhibitory or rescissory

actions to rescind and recover damages for the breach of legal warranty of *valid* contracts for the sale of animals having *vices* or defects.

Such vices or defects are of a character affecting only the private use of the animals by the purchaser. They are not the vital conditions prohibited by section 1397 to be the object of a contract for protection of the public welfare and as public policy.

The claim of Petitioner as well as the decision of the Supreme Court of Puerto Rico which was only partially reversed by the Circuit Court of Appeals is based on the argument that the word "void" in sec. 1397 should be read as "voidable", and that the words "shall not be the object of a contract of sale" should be read as "may be the object of a contract of sale at the option of the vendee".

This argument is insisted upon because this section of the Revised Code of Puerto Rico of 1902 which was carried over and adopted from the first Civil Code of Spain of 1889 was placed by the Spanish codifiers in an inapposite and disparate position in a subdivision of the Code relating to redhibitory contracts validly executed and to actions for their rescission, notwithstanding that the Supreme Court and Petitioner admit that considered alone and removed from such association the section would be given effect as applying to contracts absolutely illegal in their inception and execution because lacking a valid or licit object and consideration and prohibited by law for the public welfare.

The Civil Code of Puerto Rico of 1902 was a codification and re-enactment, to a considerable extent substantially, —but not entirely,— of the Spanish Civil Code of 1889.

Sections 1397 and 1399 were precise re-enactments of the similar articles in the Spanish Code.

However, the Legislative Assembly of Puerto Rico made numerous modifications of and additions to various subjects. The most striking additions and modifications were made in the "Preliminary Title. The Laws, Their Effects, and the General Rules For Their Application". ion".

These additions and modifications which will be more specifically referred to hereinafter responded to the purpose of the legislature to inaugurate a policy of adaptation of the laws of Puerto Rico and of their interpretation to the principles of American jurisprudence.

Precise Statement of Our Position.

If the plain purpose and effect of Section 1397, which we claim is to declare illegal and remove from commerce and human use for the welfare of the public and in pursuit of a humanitarian and scientifically based public policy, cattle suffering from tuberculosis, are to be disregarded and if the section shall be interpreted in such manner that its efficacy and enforcement are left dependent upon the selfish individual interest of the parties in the exercise by them of an election, for their benefit alone, to rescind then the contract and action in question are of a redhibitory character and the decision and judgment of the Supreme Court of Puerto Rico should be sustained.

If however, effect shall be given to the section according to its plain language and purpose, in the interests of the public, then the contract for a herd of cows purchased for the purpose of a dairy of which a majority developed tuberculosis, must be declared absolutely illegal, and it is not subject to the special forty days prescription applicable to redhibitory, or rescissory contracts and actions.

Not only does the section by its terms nullify as a matter of law the sale of one or more animals, or of a herd, infected with contagious disease but the natural effect of the existence of the disease in a greater part of a herd is to outlaw the entire herd, as a matter of practical experience and of human welfare.

All the surviving members of the herd become contraband, "hot" cattle,—out of the commerce of man.

Section 1238 of the Revised Code of Puerto Rico provides:

All things, even future ones, which are not out of the commerce of man, may be objects of contracts.

The Decision of the Supreme Court was Clearly Wrong in its Interpretation of Section 1397 of the Civil Code which consists only of a statement of General and Universal Law Terms.

There has not been a single case decided previously either by the Supreme Court of Puerto Rico or the Supreme Court of Spain,—hence none could be cited,—to serve as a precedent to sustain the decision.

The only precedent directly in point is a previous decision of the Supreme Court of Puerto Rico. which the court ignored, rendered by the same judge who rendered the present decision, but which is directly contrary to it. This case will be more specifically referred to hereinafter. (Page 15 herein).

The Supreme Court of Puerto Rico relied for judicial precedent exclusively on American state cases, demonstrating clearly that the vital question of interpretation involved was not a matter peculiar to the civil law.

It based its decision upon the commentaries of Scaevola, which are palpably contradictory and fallacious. This point will be fully discussed in Point C.

Summary of Proceedings in the Courts Below.

District Court of San Juan.

The complaint filed. December 12, 1929 by *Alonso Brothers* vs. *José Matos* is entitled "Inexistence of Contract and Cancellation of Entries" (page 1, Transcript of Record). It alleges the purchase by plaintiffs from defendant March 1, 1929 of a herd of cattle composed of 122 head for the lump sum of $18,000, of which sum $3,000, were paid in cash on the day of the contract, by the transfer from the Alonso Brothers to Matos of a town property valued at $5,000, and by the execution of a mortgage by the Alonso Brothers to Matos on town property to secure the sum of $10,000 payable two years after date.

The complaint alleged that from the 18th of March 1929 to the 6th of December 1929, 43 of the cows died of tuberculosis, a contagious disease contracted prior to the sale, and that after a tuberculine test by the Health De-

partment of Puerto Rico, 29 more head were condemned prior to the suit.

Plaintiffs tendered to defendant the surviving cows of the herd at the institution of the suit.

Plaintiffs prayed the recovery of the cash payment of $3,000, and the sum of $5,000, value of the property transferred to defendant, together with the annulment of the mortage executed to secure the sum of $10,000 and the cancellation thereof in the Registry of Property.

Defendant after submitting a demurrer (Page 8, Transcript) invoking the redhibitory prescription of 40 days provided in Section 1399, which was denied, filed his answer. (Page 11, Transcript).

The answer admitted the execution of the contract and the receipt of the consideration as alleged. It admitted the death and condemnation of the cattle as alleged but set up that the tuberculosis was acquired after the sale, due to improper care by plaintiffs.

The answer renewed the defense of prescription of 40 days.

The judge made an ocular view of the surviving cattle on the premises where they were kept (page 15 Transcript) at the request of the parties.

January 12, 1931 the District Court rendered its judgment (page 23 Transcript) in favor of plaintiffs declaring null and void the contract of sale, ordering the return to plaintiffs of the sum of $3,000, the cash paid, plus value of town property transferred, and annulling the mortgage to secure the sum of $10,000, together with its inscription in the Registry of Property.

This judgment was based upon the facts found by the court set forth in "Statement of Facts and Opinion". (Page 17, Transcript).

By the terms of the judgment this statement was made a part thereof.

Following are the material findings of fact and conclusions of law (page 19, Transcript) :-

"It is well to analyze, before going ahead, and in a summary manner, the evidence adduced herein. The

evidence for the plaintiff reveals substantially that the purchase of the cattle was made on March 1, 1929.... ....that the cattle were to be used for dairy purposes .... that the cattle began to die on the 18th of March; that in July, Varas, a veterinary surgeon came to examine a dog and in passing also examined the cattle; that he performed an autopsy on one cow and found that it had tuberculosis; that then the plaintiffs went to see the defendant, explained the situation to him and he said that he did not have anything to do with it; that the cows were purchased for the purpose of a dairy.... There is no doubt that the animals which were the object of this suit died of a contagious disease such as is pulmonary tuberculosis (page 20, Transcript). It is a settled fact that the appearance of the animal does not necessarily reveal its condition of health, in other words that a cow may be apparently sound and produce milk normally and nevertheless be suffering from tuberculosis.... the evidence supports the allegations of the complaint, namely that at the time of the transaction, part of the cattle sold was suffering from a contagious disease".

In its conclusions of law the court found that the contract in question was illegal and void (page 21 Transcript) and that the action was not subject to the redhibitory prescription of 40 days as claimed by defendant.

The conclusion of the court on this last point where it appears at the bottom of page 21 of the Transcript is erroneously set forth due to an error of translation which has been corrected by a certificate from the Secretary-Reporter of the Supreme Court of Puerto Rico from which it clearly appears that the court in its opinion rendered in the Spanish language held that the action is not a redhibitory one.

Decision of the Supreme Court of Puerto Rico

The Supreme Court of Puerto Rico accepted the findings of fact of the District Court. Adopting these facts

and findings and considering that the contract in question was embraced within those prohibited by Section 1397 of the Civil Code it decided that the contract was not illegal, or absolutely void, but that it was voidable at the election and for the benefit of the purchaser and that its legal effect and the remedy for the violation of the section are governed by the provisions of the Civil Code relating to redhibitory contracts and actions, including the special prescription of 40 days.

The court found that the contract for the herd of cows was "individual" or "distributive",—not unitary,—: that as to the cows that had died or were condemned the right to recover the purchase price therefor was prescribed by the redhibitory prescription; and that as to the cows surviving at the institution of the suit plaintiffs never had a right of action to recover the purchase price.

Decision of the Circuit Court of Appeals.

The court accepted the facts as found by the District Court and approved by the Supreme Court of Puerto Rico. In the decision of the majority the contract in question was held to be illegal, —inexistent,— as to the cows that died or were condemned as a result of tuberculosis, that the contract and action embraced in Section 1397 of the Civil Code are not redhibitory, and that the prescription of 40 days with reference to redhibitory actions does not apply. On this ground the judgment of the Supreme Court was reversed and respondents (appellants) were permitted to amend their complaint which prayed for the recovery of the price of the entire herd so as to sue only for the cows that had died or were condemned before the institution of the suit.

However, with reference to the cows surviving at that time the court adopted the decision of the Supreme Court as to the interpretation of the section that effect could not be given to it in support of the claim of Respondents as to the unitary character of the herd.

In the dissenting opinion of Justice Bingham he rejected the interpretation of the Supreme Court of Puerto Rico

to the effect that in all cases Section 1397 of the Code established a voidable or redhibitory contract, holding that contracts in certain cases covered by this section must be held to be illegal and inexistent, but that in the present case the Supreme Court of Puerto Rico did not err in holding the action in question to be of a redhibitory character and entirely barred by the redhibitory prescription.

PROPOSITION I

THE DECISION OF THE SUPREME COURT OF PUERTO RICO WAS CLEARLY WRONG:

FIRST: IN DISREGARDING THE PLAIN AND MANDATORY PROVISIONS OF SECTION 1397 OF THE CIVIL CODE WHICH SECTION CONTAINS ONLY ORDINARY WORDS OF CURRENT USE IN GENERAL AND UNIVERSAL LAW, FREE FROM ANY ASSOCIATION OR CONNECTION WITH ANY SPECIAL FEATURE OF THE CIVIL LAW, AND IN SUBSTITUTING, CONTRARY TO THE EXPRESS PROVISIONS OF THE CODE RELATING TO ITS INTERPRETATION, A RESCINDIBLE OR RESCISSORY CONTRACT FOR ONE THAT THE LEGISLATURE DECLARED TO BE ILLEGAL, INEXISTENT.

SECOND: IN HOLDING THAT THE HERD SOLD WAS NOT OF A UNITARY CHARACTER, BUT WAS DISTRIBUTIVE AND SEPARABLE FOR THE EFFECTS OF THIS SECTION OF THE COOE INTO INDIVIDUAL MEMBERS OF THE HERD.

THIRD: IN APPLYING UPON THESE ERRONEOUS PREMISES THE REDHIBITORY PRESCRIPTION OF 40 DAYS TO THE ACTION.

The Supreme Court in holding that the contract and action in question are redhibitory with reference to the entire herd, and the Circuit Court of Appeals in adopting its decision with respect to the divisible character of the herd as to the cows surviving at the time of the suit failed to give effect to Section 1397 as a statute enacted for public policy and public welfare.

This section of the Civil Code should have been considered by the Supreme Court in connection with the provisions of the Penal Code and of the Revised Statutes, hereinbefore set forth, on the same subject in force at the time of the execution of the contract.

The Supreme Court violated the standards for Interpretation of the laws of Puerto Rico established in and by the Revised Civil Code.

In the "Preliminary Title, the Laws, their Effects and the General Rules for their Application", were enacted the following sections which it was the duty of the Supreme Court to consider and apply in connection with Section 1397 and the other laws relating to the sale of cattle with contagious diseases;

> "Section 4. Acts executed contrary to the provisions of law are void except when the law preserves their validity. Rights granted by the laws may be renounced, provided such renunciation be not contrary to law, to public interest or public order, or prejudicial to the interest of a third person".

> "Section 13. (new). When a law is clear and free from all ambiguity the letter of the same shall not be disregarded, under the pretext of fulfilling the spirit thereof".

> "Section 19. (new). When, in order to prevent fraud or from other motives of public utility, the law declares certain acts void, its provisions shall not be dispensed with or left unperformed on the ground that the particular act in question has been proved not to be fraudulent or contrary to the public good".

The words "public utility" as employed in this section are generally understood to refer to "public policy".

> "Section 1248. If the terms of a contract are clear and leave no doubt as to the intentions of the

contracting parties the literal sense of its stipulations shall be observed".

Decisions of the Supreme Court of Puerto Rico.

"The province of the court in the construction of a statute is simply to ascertain and declare what is in terms and substance contained therein and not to insert what has been omitted or to omit what has been inserted". *People* vs. *González,* 20 P. R. R. 553.

"The words used in a law are unmistakeable and, however inconsistent they may seem, it is not for the court to substitute its will for that of the legislature". *Julbe* vs. *Guzman,* 16 P. R. R. 502. Opinion by Justice Wolf who wrote the opinion in present case.

"The public policy of a state or nation should be determined by its constitution, its statutes, and its jurisprudence, and not by different opinions of laymen, attorneys, or judges in regard to the requirements and interests of the public". *Matos* vs. *Siaca,* 21 P. R. R. 400".

Spanish Doctrine

The Spanish Juridical Encyclopedia by Seix in its Vol. 19, page 820 states amongst the rules of interpretation for the codes and laws of Spain the following:

4. It is not permitted to make distinctions when the law does not distinguish nor can exceptions be made which the law does not contain.

5. The application of the law should take place in that order of things for which it has been established; objects of a different order or class can not be decided by it.

7. When the law, for fear of some fraud, declares certain acts null, its disposition can not be eluded on

the theory that such acts have been proved not to be fraudulent.

Decisions of the Supreme Court of the United States.

"No change in the meaning of the Judiciary Act of August 12, 1888 was intended or wrought by the rearrangement of its parts in the Judicial Code".
Gen. Investment Co. vs. *Lake Shore RR. Co.*, 260 U. S. 261.

"The title of an act can not be resorted to in aid of its construction when the act is free from doubt or ambiguity"
Cornell vs. *Coyne*, 192 U. S. 418.

"We are not at liberty to construe language so plain as to need no construction".
Helvering vs. *City Bank Farmer's Trust Co.*, 296 U. S. 85. 89.

"The ordinary rules of interpretation of the statute are applicable to the Louisiana Code".
Viterbo vs. *Friedlander*, 120 U. S. 707.

The case of *Tillman* vs. *Tillman* (So. Carolina) 26 L. R. A. (N. S.) 781 is peculiarly in point as to the effect of improperly placing by the codifiers Section 1397 amongst inapposite and disparate sections.

"The place assigned to a statute in a compilation can not control its plain meaning as expressed by its terms".

The Only other Decision of the Supreme Court of Puerto Rico directly in Point is Contrary to the Decision in this Case.

That case is *Booth Packing Co.* vs. *Sobrino* Bros., 34 Puerto Rico Reports 14, decided March 6, 1925.

The court based its decision in that case on Section

1238 of the Civil Code which declares void all contracts concerning things or objects, "out of the commerce of man", which is the same section upon which the Circuit Court of Appeals relied in this case in construing Section 1397.

The prescription invoked in that case and held not to apply was that stated in Articles 342 of the Code of Commerce. This section is as follows:-

> "A purchaser who has not made any claim based on the inherent defects in the article sold within the thirty days following its delivery, shall lose all rights of action against the vendor for such defects".

The court held that this prescription could only have effect with reference to a valid contract and that as the contract in question was absolutely null and void because it lacked a licit "object" and, therefore was without consideration, it did not apply.

The Supreme Court sustained this defense made by the purchaser in a suit brought by the vendor to recover the price of a consignment of canned fruits, of which a great part turned out after delivery to be spoiled and unfit for human consumption.

The court in that decision also declared as inapplicable the case of *Schluter* vs. *Fernández,* 30 P. R. R. 117, which was relied upon in that case and which is cited by Petitioner in this case as the only case in the Supreme Court of Puerto Rico to defeat the present action.

The Justice who wrote the opinion in the Booth case is the same who wrote the opinion in this case. The attorney for the defeated party in that case was the same able attorney of counsel in this case.

The prescription of 30 days provided in the article of the Code of Commerce above cited is in pursuance of principles of the civil law relating to redhibitory contracts and actions.

This appears from the decision of the Supreme Court in the present case (botton of page 34 Transcript) where the court quotes the Spanish Juridical Encyclopedia relating to the Civil law on the subject or redhibition.

"Our private law has substantially adopted the redhibitory action when authorizing the rescission of contracts of sale by reason of defects in the thing sold, under the general Civil Law as well as under the special Commercial law etc."

The vital question at issue in this case to wit,—the illegality, inexistence,—of the contract in question and its non prescription in 40 days was conclusively established by the Supreme Court in a previous decision from which we quote the syllabi:-

2. There is no contract without the concurrence of the three requisites specified in Section 1228 of the Civil Code.

4. The difference between void and voidable contracts is that in the former there is no contract by reason of the lack of one or more of the essential requisites, and in the latter that as the essential requisites are present there is a contract but it is affected by a defect which may invalidate it.

6. When a contract is void there can be no prescription of an action for its rescission because there is no starting point for computing the time for prescription.

González vs. *Fumero,* 38 P. R. R. 497.

POINT A.

The decision of the Supreme Court of Puerto Rico violated the Public Policy of the unorganized Territory of Puerto Rico Created by Act of Congress, such public policy being that which is general law throughout the United States.

Many changes were made in the laws of Puerto Rico subsequent to the change of sovereignty and prior to the execution of the contract in question in pursuance of the purpose to adapt the legislative and judicial policy of Puerto Rico to American standards.

The new sections of the Preliminary Title to the Civil Code with respect to its interpretation, heretofore cited, were introduced by the Legislative Assembly in its revision of 1902 in response to the inauguration of this policy. They were the result, in part, of the labors and report of the Commission appointed by the President under section 40 of the first Organic Act of April 12, 1900:—

> ...."to compile and revise the laws of Puerto Rico, also the various codes of procedure and systems of municipal government now in force, and to frame and report such legislation as may be necessary to make a simple, harmonious and economical government, establish justice and secure its prompt and efficient administration, inaugurate a general system of education and public instruction, provide buildings and funds there for, equalize and simplify taxes and all the methods or raising revenue, *and make all other provisions that may be necessary to secure and extend the benefits of a republican form of government to all the inhabitants of Porto Rico.*" (Italics ours.)

In its report to the President, the Commission submitting its suggestions for revision stated,—"it was undoubtedly the purpose of Congress to bring the institutions of the island into clearer harmony with the American system", although it recommended that changes should be made gradually.

It is beyond the realm of discussion that the change of sovereignty and the subsequent action of Congress brought the island under the aegis of the Constitution of the United States in so far as legislation affecting the rights of life, persons and property of its inhabitants are concerned and also brought it and its inhabitants under the influence and inspiration of the legal institutions and public policy of the United States.

> "In construing the Organic Act of a Territory this court will consider that Congress intended to create a government conforming to the American system". *People of Porto Rico* vs. *Rosaly,* 227 U. S. 270.

The principle announced in the above case must be held to apply not only to the interpretation of the Organic Act itself but also to the interpretation of the powers and their manner of execution conferred upon the territory.

We wish to be understood that we do not claim that the policy of adaptation was meant to apply immediately to laws relating to property rights, successions, domestic relations, or to any other subject intimately associated with the previous traditions of the inhabitants but rather to the adaptation of those principles which contain the general public policy of the United States and of the States with reference to public health, morals and police power.

The provisions of the Penal Code which was adopted at the same session of the Legislative Assembly at which the Revised Civil Code was adopted and the provisions of the Act of March 14 1907 making criminal the sale and possession of cattle suffering from contagious diseases were certainly enacted in response to this policy. In view thereof the co-related Section 1397 of the Civil Code must be interpreted in the light of that policy, particularly under the mandates of interpretation for the laws of Puerto Rico established by the Legislative Assembly.

"Federal courts are not bound by the decisions of state or local courts in matters of general law".

Carpenter vs. *Providence, Washington Ins. Co.,* 16 Peters 495,

Washburn & Moen Mfg. Co. vs. *Reliance Marine Ins. Co.,* 179 U. S. 1;

Mutual Life Ins. Co. of N. Y. vs. *Johnson,* 293 U. S. 335.

"The Judiciary Act declaring local law rules of decisions in federal courts is limited in its application to laws strictly local and to the construction thereof adopted by local tribunals and to rights and titles to things having permanent locality; it does not extend

to contracts and other instruments of commercial nature"
Swift vs. *Tyson,* 16 Peters 1;
Brooklyn City RR. Co. vs. *Nat. Bank Rep.* 102 U. S. 14;
Watson vs. *Tarpley,* 18 Howard 517.

"A decision of the Supreme Court of Puerto Rico on a question of local law is entitled to great weight, but is not conclusive, and is reviewable, especially where it is based on a consideration of the general law."
Successors of Fantauzzi vs. *Municipal Assembly* of Arroyo, 295 Fed. 803 (CCA, 1st Circuit).

POINT B.

If the interpretation of Section 1397 involves a question of General Law then the decision of the Supreme Court of Puerto Rico Disregarded the Public Policy of both the United States and the Territory of Puerto Rico;

"In the federal courts whether a contract is against public policy is a question of general law not dependent on any local statute or usage. While the decision of the local courts are entitled to the weight of persuasive authority, federal courts will exercise their own judgment".
Liverpool etc. Steam Co. vs. *Phenix Ins. Co.,* 129 U. S. 397;
Bucher vs. *Cheshire RR. Co.,* 125 U. S. 555,
Smith vs. *Alabama,* 124 U. S. 465.

"The public policy of the government is to be found in its statutes and when they have not directly spoken then in the decisions of the courts and the constant practice of the government officials; but when the law making power speaks upon a particular subject, over which it has constitutional power to legislate public policy in such case is what the statute enacts".
United States vs. *Trans- Missouri Freight Association,* 166 U. S. 290, at bottom of page 340 of Opinion.

"If the law prohibits any contract or combination in restraint of trade or commerce, a contract or combination made in violation of such law is void, whatever may have been theretofore decided by the courts to have been the public policy of the cauntry on that subject". *United States* vs. *Trans-Missouri Freight Association,* ibid, at bottom on page 340 and top of 341 Opinion.

"A contract which contemplates the violation of a statute is void whether the act is malum in se or only malum prohibitum".
United States vs. *Owens,* 2 Peters 527; Opinion at p. 539.

"There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal". Ibid, Opinion page 539.
Gibbs vs. *Consolidated Gas Co.,* 130 U. S. 396.

"An act done in violation of a statutory provision is void and confers no right upon the wrong doer".
Ewert vs. *Blue Jacket,* 259 U. S. 129;
Burch vs. *Taylor,* 152 U. S. 632;
Miller vs. *Ammon,* 145 U. S. 421.

"In all cases where contracts are claimed to be void as against public policy, it matters not that any particular contract is free from any taint of actual fraud, oppression or corruption, for the law looks to the general tendency, and the vice is in the very nature of the contract itself".
Mc Mullen vs. *Hoffman,* 174 U. S. 639.

"The legislature itself could not directly, or by authority to the courts, limit or abrogate the police power which is inherent and vested in it by the local constitution".
Northern Pacific RR. C. vs. *Minn.,* 208 U. S. 583;
Chicago B. & Q. RR. Co. vs. *Mc Guire,* 219 U. S. 549.

"Every part of the consideration of a contract goes equally to the whole promise and therefore, if any part of it is contrary to public policy, the whole promise fails".
Hazelton vs. *Sheckells,* 202 U. S. 71, Opinion at page 78.

POINT C.

The Decision of the Supreme Court of Puerto Rico was clearly Wrong in its Reliance upon the fallacious Commentary of Scaevola in Disregard of the Statutory Laws of Puerto Rico.

Without being able to refer to or rely upon a single precedent of its own court or the Supreme Court of Spain in support of its conclusion the Supreme Court in its decision that the contract in question was voidable, or rescissory, was controlled by a commentary of Scaevola notwithstanding that other equally eminent Spanish, French and Italian Commentators of the civil law sustain the theory of absolute illegality,—inexistence,—and the non prescription of the same.

The court in its Opinion (page 30 Transcript) confesses:

"Some of the commentators on the Civil Code apparently say, especially when discussing the question of prescription, that section 1397 makes the contract absolutely inexistent, implying therefore, that no prescription runs", citing
10 Manresa (4th Ed) 229;
24 Laurent 109,
1 Gasca 357.

The comentaries of these eminent authorities are set forth later in this brief.

We will first quote from the opinion of the Supreme Court and its reference from Scaevola in support of the conclusion reached by it. We shall follow by submitting

quotations from the same Scaevola in his commentaries upon the same identical article of the Spanish Civil Code corresponding with section 1397 of the Code of Puerto Rico and upon other articles of the Code, which commentaries are in complete contradiction with the commentary which the Supreme Court selected to rely upon in its decision.

Let us first consider one of the commentaries of Scaevola in this connection, quoted by the Supreme Court, which will serve to destroy his authority in support of the commentary next to be referred to in which he converted the words and terms of the codifiers of the Code into the opposite of their plain intent and effect, and which controlled the court.

Referring to the defective codification in connection with the adoption of the section of the Spanish Code corresponding to Section 1397 of the Code of Puerto Rico and in connection with its disparate collocation amongst sections relating to redhibitory contracts and actions Scaevola as quoted by the court (Page 39 Transcript) says:-

> "This subject of the sale of animals has been brought into the Code in fragments, which form a veritable juridical crazy quilt made up of all sorts of materials and hues. The contrast exhibited by the provisions as against each other is as striking as it is queer; the deficiencies noted as numerous as they are regrettable".

"Notwithstanding this, Supreme Court quoted from Scaevola (page 30 Transcript); the decisive and controlling Commentary:

> "We prefer, therefore, to think that "Homer slept"; that nothing else was intended than to apply specifically to the sale of animals or cattle what was already provided for all kinds of alienations in general; that, in so doing an uncalled for repetition was incurred; *and that, as it generally happens in such cases, in saying what was not needed it was ended by saying what*

> *should not have been said* Let it be understood, then, that when the contract we are discussing is declared to be void it has been intended to characterize it as "voidable" (rescindible) subject to a redhibitory action as in the case of any other contract where the thing sold lacks fitness". (Italics ours).

The Supreme Court characterizes this comment as "poignant". We agree with the characterization within the true meaning of the word.

As the result of these commentaries the court declared and decided:- (Page 31 of Transcript) :-

> "We, therefore, come to the conclusion with Scaevola that necessarily *the legislator meant to say that the contract could be rescinded or annulled as in other redhibitory actions,* and that section 1397 does not exclude the transaction made in this case from the field of warranties". (Italics ours).

We can understand how Scaevola could usurp and substitute in their functions the codifiers of the Code and the Parliament (Cortes) of Spain In view of the system under which he lived and worked, but the conditions under which the Supreme Court of Puerto Rico functions with respect to its interpretation of the laws are vastly different.

In this connection there should be considered section 11 of the Revised Civil Code of Puerto Rico in relation to its declaration of the policy of Puerto Rico.

> "Section 11. The forms and solemnities of contracts, laws and other public instruments are governed by the laws of the country in which they are executed. . . . . Notwithstanding the provisions of this and the preceding section, prohibitory laws relating to persons, their acts or property, and those which relate to public order and to good morals shall not be held invalid by reason of laws, decisions, regulations or agreements in force in any foreign country".

The Court should also have considered section 19 of the Revised Code of Puerto Rico (page 13 supra).

POINT D.

Other Commentaries of Scaevola to the same Section of the Civil Code which is in question, and to other Sections not cited by the Court, are in absolute Contradiction to the commentary Relied upon by it and establish the Absolute Illegality of the Contract in Question and its Non-Prescription.

In the same voluminous commentaries made by Scaevola to Article 1494 of the Spanish Civil Code (Section 1397 Revised Code of Puerto Rico), appears the following declaration in which he affirms that the contracts referred to in that section are absolutely illegal,—inexistent, Hence, we insist, they can not be subject to the prescription of 40 days for redhibitory contracts as he erroneously concluded. Volume 23, page 665.

> *"Illegality of the sale of animals infected with contagious diseases.* The Public Administration is constantly dictating dispositions tending to avoid contagion amongst cattle and more especially the contagion which may be caused to persons from their food products. This matter being one of public policy, foreign legislatures from which has been imported Article 1494 not only prohibit and punish the traffic in such cattle but declare that they are not susceptible of being the object of a contract of sale.
>
> *" Thus said article also establishes, as if that were not sufficient by riveting the nail and disposing that all contracts made with respect to animals and cattle suffering from contagious diseases shall be illegal.* (Italics ours.)

From the moment that the Code casts out these animals from the field of free contract, not only is the illegality which it condemns fixed according to law but

it is an inevitable consequence of that premise. Where there is no licit object there can be no valid contract.

In the field of theory it may be discussed if the precautions of the legislator should go so far as to compare animals infected with contagious disease with impossible things, to those which do not exist, and to those which are not susceptible of ownership which things are thouse which are removed from the supreme right of man to contract. All the more may this be discussed when there is taken into consideration the general extension of the precept within which it even results impossible to purchase animals infected with contagious diseases to be destroyed or to be utilized as fertilizer.

But the law with its due penalty is not limited in its declarations; what is contrary to law can not be the object of contract, and what can not be the object of a contract irremediably causes the illegality of the same." (Italics ours).

With this frank and positive admission of the illegality, — inexistence — of a contract made in violation of section 1397,—which illegality or inexistence removes it from the redhibitory prescription—Scaevola with [redacted] astonishing inconsistency and fallacy, in the other part of his commentary to the section in question, relied upon by the Supreme Court, reached the conclusion that the contract and action under such section are redhibitory and subject to the prescription of such actions. This conclusion is deduced though Scaevola and the Supreme Court of Puerto Rico declare in other general opinions that contracts which are illegal, —inexistent,— are not subject to prescription. In the case of González vs. Fumero, hereinbefore cited at page 17 of this brief, the Supreme Court of Puerto Rico decided:—

"When a contract is void there can be no prescription of an action for its rescission because there is no starting point for computing the time for prescription".

If the inconsistency and fallacy of Scaevola has not already been satisfactorily demonstrated we submit the commentary made by him to Article 1479 of the Spanish Code,—the equivalent of Section 1382 of the Revised Code of Puerto Rico, which we refer to only for the purpose of comparison.

This section is found in both codes in connection with the provisions of the civil law with respect to remedies based on the legal warranty for loss or damage to property sold and purchased under a valid contract.

Article 1479 of the Spanish Code (section 1382 Revised Code of Puerto Rico) provides:-

> "Should the vendee lose, on account of the eviction, a part of the thing sold of such importance in relation to the whole that he would not have purchased it without said part, he may demand the rescission of the contract; but with the obligation to return the thing without other charges than those it had when he acquired it. The same provision shall be observed when two or more things should be jointly sold for a lump sum, or a special price for each one of them, should it clearly appear that the vendee would not have purchased one without the other".

Commenting upon the above article Scaevola says: (Vol. 23, page 580) :-

> "In conclusion it is most clear that when the purchaser elects to rescind, article 1299 which fixes the period for four years to petition for the same shall apply".

Section 1299 of the Spanish Code is the equivalent of section 1266 of the Revised Code of Puerto Rico and provides:

"The action asking rescission must be brought within four years".

The attention of the court will again be called to section 1382 in connection with our insistent claim that the illeg-

ality of the contract in question extended to the entire herd, which is the subject of a special point hereinafter presented in this brief. (Subtitle H., page 34).

The first subdivision of the subject in the Revised Code of Puerto Rico and to which section 1382 is related, is entitled "Warranty in Case of Eviction" and comprises sections 1378 to 1386.

The second subdivision of this title follows immediately thereafter and is entitled "Warranty against Hidden Defects of or Burdens on the Things Sold".

This subdivision is a branch of the general law of warranty and applies to the so called "redhibitory" contracts and actions.

The word "eviction" as used in civil law with reference to remedies for breach of warranty is defined by the Code:

> Section 1378. "Eviction shall take place when by final judgment and by virtue of a right prior to the sale, the vendee is deprived of the whole or a part of the thing purchased. The vendor shall be liable for the eviction even though no stipulation has been included in the contract on the subject.
> The contracting parties may, however, increase, decrease, or suppress this legal obligation of the vendor".

The contracts of sale protected by these provisions of the code relating to warranty in case of eviction (breach) are contracts validly executed in accordance with the law.

POINT E.

Contrary Opinion of Other Equally Eminent Commentators of the Spanish Civil Code to Scaevola's commentary to section 1397, (Revised Code of Puerto Rico.)

Manresa, one of the leading commentators of the Spanish Civil Code, in his commentary on Article 1494—the equivalent of section 1397 of the Revised Code of Puerto Rico, (Vol. 10, page 250) says:

> "It is easy to observe that what the Code does by this provision (Art. 1494) is not to determine the respon-

sibility of warranty, but to declare an illicit object of contract, basing itself upon very powerful reasons of public policy. This premise being settled, the consequence which followed was not certainly the responsibility of warranty; the logical consequence is the one deduced by the Code, the declaration of nullity, because if contracts are null when one of the essential requisites is lacking, and one of the requisites which must necessarily concur is the legality of the object, when the object is declared illicit, the nullity of the onctract is a necessary consequence".

"The contract of sale of cattle and animals,—continues the second paragraph of the article—shall also be null, when after expressing therein the service or use for which they are acquired, they should prove to be useless for such service or use. We repeat, with reference to this precept, what we have just said; it is not that the responsibility of the seller to perfect the warranty arises in such case; it is that the law declares the contract null".

Another leading authority on the Civil Code of Spain, Martínez Ruiz, in his commentaries, "The Civil Code Interpreted by the Supreme Court", Vol. 9, page 361, says:-

"As much may be said of the sales made at public auction, in which the period of time which must necessarily elapse between the notice of sale and the holding of the auction during which the objects of the sale may be examined with greater care constitutes without doubt a security against mistakes in favor of the purchaser. In these cases, as in the sales of discarded horses, when the latter or the cattle are suffering from contagious diseases, the sale is null and void because it covers things which the laws of sanitation and public hygiene decree that they be considered as illicit objects of commerce. This declaration of nullity is justified because the licit object of the contract is lacking".

The foregoing comment refers to Article 1493 of the Spanish Code, the equivalent of section 1396 of the Revised Code of Puerto Rico.

It disposes of the argument made by Pecitioner on pages 15 and 17 of his brief concerning the supposed inference erroneously drawn from this section in favor of the supposed redhibitory character of the contracts prohibited by section 1397.

Laurent, the eminent French commentator of the Code Napoleon, interpreting provisions of that code similar to those contained in Section 1397 of the Civil Code of Puerto Rico says:-

> "It appears from the Penal Code (Articles 319-321 and from the Decree of the Council of June 26, 1784, that it is forbidden for any one to sell or offer for sale at the fairs and markets or at any other place, horses or beasts suffering or suspected of suffering from contagious diseases. The absolute prohibition to sell places the said animals outside of commerce; consequently, the sale is null. It is not necessary to consider whether the seller acted in good faith or not; the sale is null for want of an object and it might even be held that it is inexistent. *It is not necessary either, to inquire whether the disease constitutes a vice justifying rescission, because it is not by reason of a vice that the sale is null, but for the reason that the thing is outside of the commerce*". (Italics ours).
>
> Laurent, "Principles of Civil Law", Vol. 24, pp. 109, 110

The Italian commentator Gasca commenting on a provision of the Italian Code similar to section 1397 of the Code of Puerto Rico says:-

> "The sale is void when the subject-matter thereof, which coincides with its object, is contrary to law or public order. (Article 1122 of the Civil Code).
>
> "It is void because, the things alienated being outside the commerce of man, the vendor would act fraudulent-

ly in selling them; also because the sale can not be valid when it constitutes a crime or a violation of law.

"In my opinion the judgments which regard the infectious or contagious disease of an animal as a redhibitory vice are defective and wrong. Undoubtedly the absolute nullity of the contract of sale in such cases should not be declared except after it has been proved that the germ of the disease antedated the contract, since the animal could have contracted the disease after the sale. But once such proof is established, whether the vendor acted in good or bad faith, *the sale should not be avoided only by reason of the exercise of the redhibitory action, but it should be adjudged null and void for lack of the thing which according to law may be the object of the sale".* Page 357. (Italics ours).

POINT F.

The decision of the Supreme Court in its Interpretation of Section 1397 is Clearly Wrong because it is in Absolute Conflict with and in Violation of other Plain sections of the Civil Code which are declaratory of general law relating to the illegality of contracts, and which are Unaffected by Special Features Peculiar to the civil law.

"Section 1222. (Revised Code of Puerto Rico.) The contracting parties may make the agreement and establish the clauses and conditions which they may deem advisable, provided they are not in contravention or law, morals, or public order", [public policy].

Scaevola in commenting upon this article in the Spanish Civil Code (Art. 1255) says:-

"Definitely, agreements in contravention of public policy are to be under stood to be those which are prohibited by law, whether properly and strictly and in their entirety relating to the public right, or whether relating to private right, but affecting certain precepts of social interest". (Vol. 20, page 505).

"Agreements prohibited by law and in contravention of good customs have no force whatsoever. The article speaks of law, without adding any qualifying adjective from which it results that the exception extends to all. Thus, nothing can be stipulated in violation of a law whether this be substantive or adjective,—of administrative, civil or penal character (Vol. 20 pag. 474).

Section 1228. Revised Code of Puerto Rico (Art. 1261. Spanish Code).
"There is no contract unless the following requisites exist: (1) consent of contracting parties; (2) a definite object which may be the subject of the contract; (3) the cause [consideration] for the obligation which may be established".

This principle of the civil law declares the general law of the United States relating to the essential elements of contracts.

Under the general title of the Code relating to "Contracts in General" and in the subdivision relating to "The Object", (subject matter) of contracts the Code declares;

Section 1238. "All things, even future ones, which are not out of the commerce of man, may be objects of contracts..... All services not contrary to good morals may also be the object of a contract".

Under the general title of the code relating to contracts in general and under the subdivision relating to "Consideration" (cause) the Code provides:—

Section 1242. "Contracts without consideration or with an illicit one have no effect whatsoever. A consideration is illicit when it is contrary to law and good morals".

Scaevola in commenting upon the similar article, 1275, in the Spanish Code, declares:—

"The illicit character of the consideration produces its absolute inefficacy; and the consideration is

illicit when it is contrary to the laws or good, morals". (Vol. 20, page 774).

"Every part of the consideration of a contract goes equally to the whole promise and therefore, if any part of it is contrary to public policy, the whole promise fails".
Hazelton vs. *Sheckells,* 202 U. S. 71, Opinion at page 78.

POINT G.

The Decision of the Supreme Court of Puerto Rico was Clearly Wrong in Not Sustaining the Absolute Illegality,—Inexistence,—of the Entire Contract in Question, thus Violating the Provisions of the Civil Code Relating to Nullity of Contracts,—which are Declaratory of the General Law.

Section 1267. "Contracts containing the requisites mentioned in section 1228 may be annulled even when there should be no lesion to the contracting parties, whenever they contain any of the defects which invalidate them according to law".

Section 1268. "The action for nullity shall last four years".

Scaevola in his commentary to section 1267 (Art. 1300 Spanish Code), Vol. 20, page 955, says:—

"Void contracts.....are those which have no existence,—those which have a vice in their origin which illegally affects their inherent efficacy;
rescindible or inefficacious contracts are those which are valid in principle in accordance with the law as to their manner of conception and formalization, and encounter an obstacle which prohibits their performance".

(Page 959) "Let us first classify contracts as existing or non-existing according as they contain or not the

three requisite essentials, of consent, object and consideration. If they do not contain these..... if a definite object was lacking, or if its vitality was not due to a definite consideration, the contract does not exist. In such cases there is no contract, as stated in article 1261; and it is therefore, the case of inherent and fundamental nullity".

Article 1261 of the Spanish Code referred to is the same as section 1228 of the Revised Code of Puerto Rico. (See page 32 herein).

Section 1270. "When the nullity of an obligation has been declared, the contracting parties shall restore to each other the things which have been the object of the contract with their fruits, and the value with its interest, without prejudice to the provisions contained in the following sections".

POINT H.

The Decision of the Supreme Court was Clearly Wrong in Not Sustaining the Illegality of the Contract in question since the sale of the Diseased Cattle constituted a Crime which vitiated the Entire Contract.

Section 1272. (Revised Code). "When the nullity arises from the illegality of the consideration or of the object of the contract, if the fact constitutes a crime or misdemeanor, common to both contracting parties, they shall have no action against each other, and proceedings shall be instituted against them, and, furthermore, the things or sum which may have been the object of the contract shall be applied as prescribed in the Penal Code with regard to the goods or instruments of the crime or misdemeanor. This provision is applicable to the case in which there is a crime or misdemeanor on the part of only one of the contracting parties, but the one which is not guilty may recover what he may have given, and shall not be bound to fulfill what he may have promised".

Respondents Respectfully insist that the decision of the Supreme Court violated the second paragraph of the preceding section, which is declaratory of general law.

Scaevola in commenting on this article in the Spanish Civil Code, and those associated with it in the Chapter relating to "nullity" of contracts, says (Vol. 20, pages 995, 996) :—

> "What is, above all, the true and inherent effect of nullity? To annul a contract is to declare that it could not have been executed; or that the parties to it lack capacity; or because the consent to the contract was not voluntarily given; or because the stipulations were contrary to the law or good morals.
> Thus, nullity resolves itself into inexistence; the void contract which simulated factual existence, for greater or less time, never had it juridically".....
>
> Pag. 996. "A void contract is one which has never existed juridically; one which was born, as a fact, but without conditions of life. The first and principal consequence, amongst others of the nullity is, therefore, that the things revert to the condition and state they had when the contract was executed, etc."

POINT I.

The Decision of the Supreme Court was clearly wrong in holding that the contract was valid as to the Members of the herd surviving at the time of the suit, in disregard of the unitary character of the herd resulting from the purpose and effect of section 1397 of the Civil Code and the Provisions of the Penal Code and of the Revised Statutes. In following to this extent the decision of the Supreme Court the Circuit Court of Appeals was inconsistent, having already held the contract to be illegal. Thus it erred and failed to do complete justice to Respondents.

Section 1397 of the Code as translated into English related to "animals and *cattle*". The word "animals" refers to one or more beasts of a different species, from

milch cows and beef cattle; whereas the word "cattle" refers to a herd of milch cows or beef cattle. The addition of the word "cattle" (ganado) to the word "animals", [redacted], included as a separate legal object a compact or unitary herd of the species of milch cows or beef cattle.

In the Spanish text the words employed are:—

No serán objeto del contrato de venta los ganados y animales que padezcan enfermedades contagiosas, etc."—"Animals *and cattle* suffering from contagious diseases shall not be the object of a contract of sale". (Italics ours).

Escriche, the universally accepted lexicographer of Spanish legal terms and phrases, defines "ganado" to be a "herd, or group (*conjunto*) of tame beasts of a species that grazes or gathers together".

The Spanish word "conjunto" is defined in Appleton's Spanish-English Dictionary as "the whole, aggregate, entirety, ensemble".

The Spanish Juridical Encyclopedia of Seix, Vol. 27, page29 defines the word "ganado" in the same language as Escriche. Appleton's Spanish-English Dictionary defines the word "ganado" as follows; "livestock", cattle herd, flock, drove". As a matter of ordinary definition in the lexicographical sense it is apparent from the most ilustrious Spanish lexicographers and the most authoritative American lexicographers of Spanish-English definition, that the word "ganado" in the Spanish text and "cattle" in the English text are used to refer to a herd of milch cows or beef cattle as distinguished from individual animals of different species.

The distinction intended and accomplished in the use of the words "animals" and "cattle" is even more pronunced in section 1399 relating to the redhibitory prescription.

In this section this prescription only applies to "vices and defects of *animals*", without using the word "cattle" (ganado).

This shows the design of the codifiers of the Spanish Civil Code in framing the original article (Article 1496) to not include therein "cattle" (ganado), milch cows or beef cattle used for human food.

This species was exempt from the prescription because of the fear or danger that the contagious disease of milch cows and beef cattle would be included amongst the "vices or defects" of other species of animals, and thus subject to the rescissory or redhibitory option of the parties.

The Supreme Court in its decision (bottom page 40, top, page 41, Transcript) said:—

> "If the court below and the appellees were right that the whole sale as an entirety was annullable because of contagious disease in a majority of the animals then, of course, the complaint was good".
>
> "We have the idea that when cattle are sold, even for a dairy, the animals are sold individually. It is a distributive sale. It makes no difference that the sale was for a lump sum".

Again, (bottom of page 30 Transcript) :-

> "Let us take an example particularily germane to this case. A sale of a cow is made and both parties are acting in good faith. Nevertheless, after a while either by his own observations or the intervention of the health authorities the buyer learns that the cow has incipient tuberculosis. However, the cow is exceptionally good and the purchaser desires to retain it. Under all the authorities he could not retain the cow and get back the price. To recover the price he must return the animal. It is entirely at his election to retain the cow.
>
> No different rule could apply where cattle are sold in bulk.

The Supreme court completely changed the purpose and effect of section 1397 of the Code and the provisions of the Penal Code and of the Revised Statutes which made

contraband and illegal the retention and possession of either individual cows or a herd of cows in which tuberculosis has developed. The court said the buyer could retain the tuberculosis cow, implying the legality of its use for milk or food. The Penal Code and the Act of March 1907 make criminal such possession and use.

Even by comparison with the redhibitory contract, which the Supreme Court insisted the one in question is, the court was clearly wrong in view of section 1394 of the Revised Code relating to redhibitory transactions. This section is as follows:—

> "If two or more animals should be sold together, whether it be for a lump sum or for a special price for each of them, the redhibitory vice of each one shall only cause the redhibition of the same and not that of the others, *unless it appears that the vendee would not have purchased the sound one or ones without the defective animal.* This is presumed when a team, yoke, pair, or set is bought, even when a special price has been fixed for each one of the animals composing the same". (Italics ours).

Scaevola in commenting on the article of the Spanish Code equivalent to the above section of the Revised Code of Puerto Rico (Vol. 23, page 648 says:-

> "It being recognized from the foregoing that the various things object of the contract constitute in this case one single thing for the purpose of the responsibility of the vendor, it would not be violent, but natural and judicious,—in treating of article 1484 relating to occult defects which deteriorate the thing totally or in a principal part,—to hold it applicable to the case of the sale in bulk of various things, they being considered then one single thing of which the defective or sick would be a part.

For comparison only, at and the risk of tedious repetition, we again refer to section 1382 of the Revised Code of

Puerto Rico relating to redhibitory transactions to demonstrate the error of the Supreme Court with reference to the so called distributive, or individual character of the herd;

> Section 1382. "Should the vendee lose, on account of the eviction, a part of the thing sold of *such importance in relation to the whole, that he would not have purchased it without said part,* he may demand the rescission of the contract; but with the obligation to return the thing without other charges than those it had when he acquired it. The same provision shall be observed when two or more things should be jointly sold for a lump sum, or a special price for each one of them, should it clearly appear that the vendee would not have purchased one without the other". (Italics ours).

Scaevola in commenting upon the equivalent article in the Spanish Civil Code of the above section (Vol. 23 page 580) says:—

> "To this effect, it is so truly common sense, that the return of the thing by the purchaser in the case of rescinding the contract refers alone to the part remaining after the loss,, that no one can doubt it although there is no express provision of the code in this sense".

Can it be reasonably doubted that the members of the herd that were lost,—forty nine by death and twenty nine by condemnation.—were "of such importance in relation to the whole" that Respondents would not have purchased the whole without them, considering that the herd was purchased for dairy purposes and considering the price paid?

If the privilege is accorded to the purchaser under a valid redhibitory contract to rescind and recover the purchase price under the conditions stated in the above section the right is much more imperative in the case of an illegal

contract, for the purchase of a herd of cows suffering from a contagious disease, the possession and use of which constitute a crime.

The District Court found the following facts (page 21 Transcript);-

> "The evidence itself gives us the key, the cows were to be used for a dairy, that is for the business of milk production. This was the same business to which the defendant has been using them *and it can not be imagined that the plaintiffs paid the sum of money they paid for the* 122 *cows, if they were not going to use the cows in the same business.* (Italics ours).

Leaving aside the pecuniary loss of Respondents in the present case, the consequences of sanctioning upon the theory of redhibition the sale of the infected cattle under the conditions of fact found by the District Court would be to legalise the detestable use of the cows and their products by concealment of their actual or probable infection, to the prejudice of the health and lives of the community.

If this were done without the judicial sanction implied by the decision of the Supreme Court it would be difficult to adequately condemn such conduct.

The necessity of legally treating as a unit a herd of cows purchased for dairy purposes when even one or a few may be subject to tuberculosis is a matter of common knowledge and experience of which the courts take judicial notice.

We submit the following excerpt from an article by Alexander E. Wight, Chief, Tuberculosis Eradiction Division, Bureau of Animal Industry, United States Department of Agriculture, published as an official document by that Department, "Farmer's Bulletin", No. 1069, issued November 1919, revised to January 1936.

How Cattle Become Infected

> "The tuberculous cow is the greatest source of danger to healthy cattle. Inasmuch as it cannot be determin-

ed just when that animal becomes a "spreader" of the germs unless daily microscopic tests are made of the milk and of the discharges from the body, it is unsafe to keep her with healthy cattle. No cattle from outside sources should be introduced into a healthy herd until they have been tuberculin-tested and found free from the disease. Unquestionably more healthy cattle acquire tuberculosis by coming in contact with affected animals than in any other way".

II

WITH REFERENCE TO THE PROPER PRESCRIPTION, APPLICABLE TO THE PRESENT ACTION RESPONDENTS BELIEVE THAT NEITHER THE PRESCRIPTION FOR REDHIBITORY ACTIONS NOR THAT FOR NULLITY SHOULD APPLY.

We have seen in the case of *González* vs. *Fumero* (supra), that when a contract is void there can be no prescription of an action for its nullity because there is no starting point for computing the time for prescription.

Though we have seen in the case of *González* vs. *Fumero* (supra), that when a contract is void there can be no prescription of an action for its nullity because there is no starting point for computing the time for prescription. This is the ordinary rule.

Counsel for Respondents however, does not take the view that because the Legislature of Puerto Rico failed to attach to or provide for a violation of Section 1397 of the Code a prescriptive period that prescription never begins to run.

We frankly confess that such omission should not permit a person who becomes the victim of the void and inexisting contract covered in Section 1397 to unreasonably defer, or neglect, to bring his action to recover the price paid. This would be an intolerable situation, not sanctioned by law or equity.

Manresa, says:—(Vol. 10, page 256)

"Is the period of prescription fixed by Section 1496

> [Section 1399 Rev. Code of P. R.] applicable in the case of paragraph second of Section 1494 [Sec. 1397 Rev. Code of P. R.], that is, when the sale is one of animals which have resulted useless for the use or service for which they were required? It may not be so affirmed, because Section 1494 speaks of nullity and not of warranty against hidden vices. Shall the period of four years fixed by Section 1301 [Sec. 1268 Rev. Civ. Code of P. R.] for actions of nullity, be applied to the case? It is not possible either to affirm it because in the case of the sale of animals the granting of such period is absurd. There exists really an omission as to this particular point".

We believe that in this case the provisions of the new paragraph to Section 7 in the Revised Code of Puerto Rico should apply.

> "When there is no statute applicable to the case at issue, the court shall decide in accordance with equity which means that natural justice, as embodied in the general principles of jurisprudence and in accepted and established usages and customs, shall be taken into consideration."

The question would be governed therefore, under the equitable doctrine of laches, requiring the injured party to bring his suit within a reasonable time after he became aware of the existence of the contagious disease in the animals purchased.

This was the view taken by the District Court, (page 22, Transcript, bottom of page);

> "The injured party must claim the inexistence of the contract with reasonable diligence, as soon as he has knowledge of the occult defect or of the cause that makes the contract *inoperative*. And that is what the plaintiffs herein have done". (Italics ours).

In the printed Transcript of the record in this court the translation of the Spanish word "ineficaz" appears erroneously as "voidable". In the corrected translation by the Secretary Reporter of the Supreme Court of Puer-

to Rico, permission to file which has been requested of this court, the word is properly translated "inoperative" as appears above.

As to Tender to Petitioner of the Cows Surviving at the time the suit was brought and which was rejected by him.

Respondents respectfully submit that as they complied with the requirements of law and equity, as declared in the Civil Code, in tendering to Petitioner the surviving cows upon the institution of the suit, and at a reasonable time, if they are no longer available to make the tender effective the loss must fall upon Petitioner whose acts are responsible for his present situation, in pursuance of the rule that the loss must fall upon the party or person responsible for a wrong committed upon an innocent party.

III

THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS SHOULD BE MODIFIED BY ALLOWING RESPONDENTS TO RECOVER THE PRICE PAID FOR THE ENTIRE HERD AND TO DIRECT A REVERSAL OF THE ENTIRE JUDGMENT OF THE SUPREME COURT OF PUERTO RICO.

Under the circumstances of the case which involve simply a question of law, there being no disputed question of fact, this court has the power to modify the judgment of the Circuit Court of Appeals as prayed by Respondents.

Panama RR. vs. *Napier Shipping Co.*, 166 U. S. 280,
Cole vs. *Ralph*, 252 U. S. 286,
Delk vs. *St. Louis & S. F. RR. Co.*, 220 U. S. 580.

We copy section 701 of the Revised Statutes of the United States as enacted because it is erroneously presented and printed in the United States Code, Title 28, Section 876:

> "The Supreme Court may affirm, modify, or reverse any judgment, decree, or order, of a Circuit Court or District Court acting as a Circuit Court, or of a Dis-

trict Court in prize causes, lawfully brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require, The Supreme Court shall not issue execution in a cause removed before it from such courts, but shall send a special mandate to the inferior court to award execution thereupon".

The section is correctly cited in *Realty Co.* vs. *Montgomery*, 284 U. S. 547, 550 (1931).

By the Act of June 30, 1926 relating to the codification of the permanent laws of the United States it was provided in Section 2, Subdivision (a) thereof that the matter set forth in the United States Code shall establish prima facie such laws of the United States but that "nothing in this act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatsoever to such enactments".

Petitioner has presented the whole case and requests a complete reviewthereof. We unite with him but for a contrary purpose.

CONCLUSION

Respondents respectfully pray that the judgment of the Circuit Court of Appeals for the First Circuit be modified so as to order and direct the complete reversal of the judgment of the Supreme Court of Puerto Rico, with costs to Respondents.

San Juan, Puerto Rico,
February, 1937.

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